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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 713

THE UNITED STATES, PETITIONER

v.

THE SUNSWICK CORPORATION, A CORPORATION OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on January 5, 1948. This brief in opposition thereto is presented on behalf of the Sunswick Corporation.

Opinion Below

The opinion of the Court of Claims (R. 22-36) has not yet been reported.

Jurisdiction

The judgment of the Court of Claims was entered on January 5, 1948 (R. 36). The jurisdiction of this Court has been invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended.

Question Presented

Whether a specific directive issued by an agency of the National War Labor Board under Executive Order No. 9250 increasing the wage rate for carpenters specified in respondent's construction contract with the Government and correcting as of the date of the contract an erroneous wage rate represented by the Government in said construction contract to be prevailing for carpenters in the area of the work, constituted an interference with respondent's performance and the correction of a mistake of the Government for which the United States should be held liable.

Statement

This is a claim for extra labor costs incurred by the respondent under a lump sum construction contract with the United States. These costs resulted from an increase in the wage rate of carpenters working on a War Department canal improvement project at Sault Ste. Marie, Michigan in 1944 and 1945. In September 1944 the respondent was the successful bidder on a project of the Corps of Engineers, U. S. War Department involving the deepening of the canal, rebuilding one of the walls, and installing additional protective gates at Sault Ste. Marie, Michigan (R. 12-13). The contract specifications (R. 14-15) prepared by the Corps of Engineers for this work provided maximum wage rates to be paid on this project to the various crafts employed. The maximum wage specified to be paid to journeymen carpenters was $1.25 per hour as predetermined by the Secretary of Labor and adopted by the War Department. The respondent relied upon this maximum wage rate in preparing its competitive bid and in entering into Contract No. W-20-064-Eng.-1231 with the Government on September 21, 1944 (R. 14).

When the project got under way the respondent hired its full crew of carpenters at $1.25 per hour. After two weeks

of work at that rate the Carpenters' Union demanded an increase to $1.425 per hour. The respondent resisted the demand of the Carpenters' Union for a wage in excess of that fixed in its contract with the Government (R. 17) and the dispute went finally to the Wage Adjustment Board of the United States Department of Labor. On January 10, 1945 the said Board ordered the respondent to grant an increase from $1.25 to $1.425 to about 98% of its carpenters, *i. e.*, all carpenters doing waterfront work. The respondent obeyed (R. 24).

The respondent requested the contracting officer to rule that the respondent would be compensated for the increased labor costs in view of the contract specification which fixed $1.25 per hour as the maximum to be paid to carpenters (R. 24). Article 3 of the Contract gave the contracting officer power to make equitable adjustments in the contract price whenever changes in the specifications caused an increase in the contractor's costs (R. 13). The contracting officer denied any contract adjustment to the respondent. Thereafter the respondent appealed to the Secretary of War acting through the Board of Contract Appeals. The Board in its opinion stated that there seemed to be no question about the effect of the Wage Adjustment Board's ruling on respondent, that is, it increased respondent's expenditures over and above the amount contemplated when respondent prepared its bid. The Board ruled that it could not take jurisdiction since the question was one of impairment of the obligation of the contract (R. 24, 25).

The petitioner on page 10 of its Statement has made a gross misstatement. It is there stated that the Board of Contract Appeals dismissed respondent's appeal on the ground that the Wage Adjustment Board's decision was made by the Government acting in its sovereign capacity rather than its contractual character. On the contrary, the sole ground on which the Board of Contract Appeals dismissed respondent's appeal was that the Board did not

have jurisdiction to determine the issues involved and that its function must be limited to the finding of a factual background which may or may not afford the contractor relief depending upon the results of some procedure before another tribunal (R. 9, 21).

The Court of Claims found that respondent's costs were increased $11,222.91 by fulfilling the terms of the order with respect to the wages of carpenters to whom the order applied and that the United States should bear the extra cost (R. 21-22). Judgment was entered in that amount (R. 36).

The grounds on which the foregoing judgment is based are that the contract places upon the contractor the risk of wage increases except those caused by the United States, that the United States in its contractual capacity here compelled the contractor to raise carpenters' wages above the level anticipated in the bid and the contract documents and that the contracting officer was duty-bound to invoke his powers under Article 3 of the contract to afford the contractor relief (R. 35). Furthermore, the specifications contained a misrepresentation (relied on by the contractor in its bid) as to the prevailing rate for carpenters in the area of this work and the contractor was injured when the United States corrected its misrepresentation by determining that a higher wage rate actually prevailed in this area at all times involved herein (R. 36).

ARGUMENT

POINT ONE

Where a contracting agency fixes a maximum wage rate in a construction contract and another Governmental agency compels a higher rate to be paid, the contractor is entitled to receive its increased costs.

POINT TWO

The determination of a higher prevailing wage rate was not a sovereign act but was rather the correction of a mistake in the specifications.

POINT THREE

The risk of increase in carpenters' wages where such increase is ordered by the United States, was not a risk assumed by the contractor.

POINT ONE

Where a contracting agency fixes a maximum wage rate in a construction contract and another Governmental agency compels a higher rate to be paid, the contractor is entitled to receive its increased costs.

A recent case directly in point is that of *York Engineering Co.* v. *United States*, 103 C. Cls. 613, cert. denied 327 U. S. 784. The plaintiff contracted with the United States to build a lock and dam in the Allegheny River. The contract specifications provided for minimum wage rates which were subject to change by the contracting officer and when so changed the contract price was to be adjusted accordingly.

The government acting through the WPA increased minimum wages on nearby jobs from 35 to 50 cents and to retain its labor force the plaintiff had to increase minimum wages to 60 cents. The contracting officer refused to approve any increase in contract price. The plaintiff protested but its claim was denied completely in the War Department. It was held that if the wage increase had been directed by the Government the contract price would have, by the terms of the contract, been increased to cover it. It was the United States however who caused the plaintiff to raise its wages since the W. P. A. (a governmental agency) raised wages in the vicinity. While the contract stated that the contract price would be adjusted if the *contracting officer* ordered an increase in wages the Court held that the contractor could recover its extra labor costs if another agency of the Government caused the wage increase regardless of whether or not the contracting officer recognized the contractor's claim. In that connection the Court, in giving judgment to the plaintiff, said:

> "We think it was fairly implied in the contract that if the Government should do something which made it impracticable for the contractor to obtain labor at the minimum wage set in the contract, *the power to* increase that minimum, and *compensate the contractor for the increase would be used.*" (Italics ours.)

In the course of its opinion in the *York Engineering* case the Court of Claims cited its own ruling in the *Beuttas* case (discussed below). Thereafter the Supreme Court reversed the *Beuttas* case and before judgment was entered in the *York Engineering* case the Government moved (June 4, 1945) for a rehearing specifically calling the Court's attention to the reversal of the *Beuttas* case. The Court of Claims denied this motion and entered judgment for the plaintiff, York Engineering Co. for its increased wage expenditures. This Court obviously determined thereby that its ruling in this case is not con-

trolled by the *Beuttas* case for the reason that in the *Beuttas* case the Government did not directly increase wages but in the *York* case (as in our own case) the Government did directly and knowingly cause the wage raise.

Actually our case is far stronger than the *York* case. In our situation the Government stepped directly into our labor dispute and provided Governmental conciliation efforts, which failed. Later an agency of the Government ordered an increase in carpenters' wages thereby increasing our labor costs in a manner not contemplated when the contract was bid and awarded. In fact it is apparent that by making the increased wage rate ($1.425 per hour) effective as of the beginning of our project, the Wage Adjustment Board actually determined that the War Department had placed the wrong rate ($1.25 per hour) in the contract specifications. As in the *York* case, our contract (Article 3) (R. 13) provided that the contracting officer had the power to make an equitable adjustment of the contract price in such instances as this. The *York* case is strong authority for the proposition that where a contracting agency fixes a maximum wage rate in a construction contract, and another governmental agency compels a higher rate to be paid, the Government acting through its contracting officer should exercise such powers as it has reserved in the contract to make an equitable adjustment in favor of the contractor.

The most recent case in the Supreme Court on questions such as this is the case of *United States* v. *Beuttas,* 324 U. S. 768. While a recovery for extra wages paid in that case was reversed by the Supreme Court, the entire proceeding clearly indicates that respondent in this case is entitled to recover the extra wages paid pursuant to the order in question.

In that case Beuttas contracted to build foundations for a Government public housing project. The contract pro-

vided for certain minimum wage rates to be paid by the contractor and that if the Government should increase wages then the contract price should be adjusted accordingly. The contract further provided that the Government would not consider any claims for additional compensation made by the contractor because of payment by the Contractor of any wage rate in excess of the applicable wage rate contained therein.

Before the foundation work was completed the Government advertised for bids on the superstructure work specifying higher rates of pay than were contained in the Beuttas contract. The foundation workers struck and demanded the higher rates of pay. Beuttas had to grant their demands. The Court of Claims awarded Beuttas its increased labor costs. In said court the case was known as *B-W Construction Co.* v. *United States* 101 C. Cls. 748. The Supreme Court reversed that ruling on the ground that the Government had not caused Beuttas to pay the increased wage rates, so therefore the contract clause providing for an adjustment of the contract price could not be invoked. The Court then discussed the point that the Government had breached the covenant implied in every contract that one party may not culpably increase the other party's cost of performance. The Court held that such a breach of implied covenant would have occurred if the Government had actually caused the increase in wage rates. The award of increased costs was set aside because the Government planned that the superstructure work should be done after the foundation work was finished and that the two contracts should not run concurrently.

No agency of the United States Government had directly ordered Beuttas to increase wages nor had any such agency *knowingly* hindered the contractor in the performance of its work and for these reasons the court held that the payment of extra wages was not caused by the United States.

The following language of the Supreme Court at page 772 is most significant:

> "They (the Court of Claims) held that by inviting bids for the superstructure at minimum wages higher than those fixed in respondent's contract for the foundations the petitioner breached the implied condition (that neither party will hinder the other in his discharge of the obligation imposed on him nor increase his cost of performance) but of course this can only be true if the Government caused the increase in wages."

From this language the implication is clear that had the Government caused the increase in wages the contractor would have recovered. In our case the United States acting through the Department of Labor, not by indirection but by a specific Directive Order, increased carpenters' wages on our project. Furthermore in the *Beuttas* case the Supreme Court points out that the Government took no part in the dispute between the contractor and its workmen. In our case on the other hand the Government took a strong hand in the settlement of the dispute. The Government on May 22, 1942 made an agreement with the Building and Construction Trades Department, A. F. L.; after the dispute arose the Government's Conciliation Commissioner attempted to settle it; a hearing officer visited the area to conduct a hearing attended by the contracting officer (R. 24) on behalf of the Wage Adjustment Board, U. S. Department of Labor; and on January 10, 1945 the Wage Adjustment Board dictated that an increase be made effective retroactively to the inception of the contract work (R. 23-24).

The general principle of law on which Point One, now under discussion, is based has been well established in this Court and elsewhere. Where an owner (in this case the United States) by its acts or orders makes performance more expensive to the contractor than such performance

would have been under the terms specified in the contract, the contractor is entitled to recover his extra costs occasioned by such acts or orders.

Some of the decisions upholding this principal are:

United States v. *Smith*, 256 U. S. 11;
Collins v. *State of N. Y.*, 259 N. Y. 200.

In 1924 the Virginia Engineering Co. contracted with the United States to put plumbing in a Veterans' Bureau Hospital in Pennsylvania. Other contractors had contracts to erect the building and to do the electrical work. The other contractors were unionized but the claimant was operating an open shop. The local unions demanded that the claimant unionize. It refused and the unions struck the whole job. The claimant's men continued to work regularly.

General Hines, Director of the Veterans' Administration called a meeting in Washington, D. C. and said that the Veterans' Administration needed the hospital badly and that, if the strike wasn't settled soon, the Government would take over the contracts. This amounted to a request by the Government that the contractor accede to the union's demand. The contractor did so. Numerous additional union demands followed and at the Government's urging and requests the contractor acceded to all of them. Its added labor costs were $71,000. It was held that the contractor was entitled to recover. The threat of the Government to take over the contracts was in the nature of duress upon the contractor. *Virginia Engineering Co., Inc.* v. *U. S.*, 89 C. Cls. 457. See also *Dravo Corp.* v. *U. S.*, 93 C. Cls. 734; *Edward E. Gillen Co.* v. *U. S.*, 99 C. Cls. 574; *R. C. Huffman Const. Co.* v. *U. S.*, 100 C. Cls. 80; *John E. Sjostrom Co.* v. *U. S.*, 100 C. Cls. 548.

As recently as March 5, 1945 the Court of Claims reaffirmed this principle in the case of *Hardie-Tynes Mfg. Co.* v. *U. S.*, 103 C. Cls. 274. There the contractor raised

wages on a Government project not as a result of an order of the Government as in our case, but as a result of a gratuitous appeal by the President.

Thus, from widely varied factual situations, it appears settled that where the Government fixes a maximum wage rate in a contract and then causes that rate to be raised, the Government has breached the implied condition of every contract that it will not culpably increase the contractor's costs of performance and in such instances the contractor may recover. We believe we have demonstrated that our case falls squarely within this rule.

POINT TWO

The determination of a higher prevailing wage rate was not a sovereign act but was rather the correction of a mistake.

By the Act of March 3, 1931 as amended by the Act of August 31, 1935 (40 USC Sec. 276(a)) all Government construction contracts must contain a provision stating the minimum wage to be paid various classes of laborers and mechanics based upon the prevailing wage as determined by the Secretary of Labor.

The statute further provides that such wage shall be fixed in accordance with the wage rate prevailing for the corresponding classes of mechanics employed on projects of a similar character in the area where the work is to be performed.

Certainly the petitioner cannot maintain that the fixing of the prevailing wage rate for a given locality pursuant to the above statute is a sovereign act. It is obviously ministerial.

3 *Am. Jur.* Sec. 3, page 830;
City of Omaha v. *Omaha Water Co.*, 218 U. S. 180;

Zimmerman v. *Marymor,* 290 Pa. 299;
Gillioz v. *Webb,* 99 F. (2d) 585.

In the latter case the Circuit Court of Appeals, Fifth Circuit at page 587 said:

> "The function of the Secretary in thus ascertaining and declaring the prevailing rate of wages is not arbitrational or in the nature of a judicial inquiry, and therefore requiring for its validity a formal controversy and hearing. It is that of an appraiser or valuer, a part of the process fixed by contract for determining a price, or an amount to be paid."

Petitioner seeks to invoke the principle involved in *Horowitz* v. *United States,* 267 U. S. 458, and in the early decisions of this court in *Deming* v. *United States,* 1 C. Cls. 190; *Jones* v. *United States,* 1 C. Cls. 383, and in *Wilson* v. *United States,* 11 C. Cls. 513, as well as in its recent decisions in *Gothwaite* v. *United States,* 102 C. Cls. 400; *Standard Accident Insurance Co.* v. *United States,* 103 C. Cls. 607, and *Clemmer Construction Co., Inc.* v. *United States,* 108 C. Cls. 718, that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.

This principle is inapplicable to the facts of this case. It may be granted, as petitioner contends, that the Government in its sovereign capacity and acting for the public good set up a general program to control inflationary tendencies and minimize work interruptions which might interfere with the effective prosecution of the war, and that Executive Order No. 9250 and General Order 13, which issued thereunder, were promulgated as a part of this program. It still does not follow that the action of the Wage Adjustment Board in directing the respondent to increase its carpenters' wages can be so isolated under the guise

of an act of sovereignty as to permit the Government, in its capacity as a party to the contract, to disavow having had any part in such action, and to disclaim any liability for whatever increased burden this action may have added to the performance of the contract. The increased wage costs resulted not from the Government's public and general act in setting up its wartime system for controlling and adjusting wages, nor from any widespread and general application of a device created for this public purpose as a matter of national policy, but rather from a specific order issued on a particular job by one agency of the Government, to wit, the Wage Adjustment Board, to whom the contracting agency, the War Department, had by a provision of its contract delegated authority to modify the specifications as to wage rates. The distinction between the manner of conduct for which the Government was held not liable in the cases above cited, and the act for which the petitioner has been held responsible in the instant case, is obvious.

The underlying basis for the doctrine of nonliability of the Government for its general and public acts as a sovereign is well expressed in *Jones* v. *United States, supra,* where the court said:

> "In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants."

The Government may by the terms of its contract bind itself for the consequences of some act on its behalf which, but for the contract, would be nonactionable as an act of the sovereign. As shown in *Bostwick* v. *United States,* 94 U. S. 53, 69, the liability of the Government in such circumstances rests upon the contract and not upon the act

of the Government in its sovereign capacity. It was there held that while the Government was not answerable for that portion of the destruction of trees and fences and the removal of stone and gravel from the plaintiff's property which occurred during the wartime occupancy of said property by Federal troops prior to a lease of the premises to the Government, it was answerable in the Court of Claims for that destruction and loss which the troops occasioned during the Government's occupancy of the premises under lease, as voluntary waste within the prohibition of the implied agreement in such lease. The court stated (p. 69):

> "If there had been in this lease an express agreement to repair, certainly it could not have been successfully claimed that the Court of Claims would not have had jurisdiction to award damages for a failure to rebuild after the fire, even though the fire was caused by the soldiers while in the hospital for treatment. But the implied obligation as to the manner of the use is as much obligatory upon the United States as it would be if it had been expressed. If there is a failure to comply with the agreement in this particular, it is a breach of the contract, for which the United States consent to be sued in the Court of Claims. All depends upon the contract. Without that, the jurisdiction does not include actions for damages by the army; with it, damages contracted against may be recovered as for a breach of the contract.
>
> It appears in the finding that during the occupancy under the lease ornamental trees were destroyed; fences and walls torn down, and the materials used for sidewalks and the erection of other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. This was voluntary waste, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action."

If the War Labor Board, or the Wage Adjustment Board as its agent, had had under consideration and had decided pursuant to Executive Order 9250 a question of national policy concerning wages or wage rates generally or those in a particular industry in connection with the stabilization of the national economy and had decided that for economic reasons to authorize a general wage increase, rather than whether the Government had or had not made a proper classification of carpenters and fixed a proper wage rate therefor, such a broad policy decision applicable to everyone alike would be one which might properly be classified as a sovereign act for which no recovery could be had by a contractor for increased costs occasioned thereby. But on the facts and under a proper interpretation of the contract here involved, the action which the Government took in this case through the decision of the Wage Adjustment Board which changed one of the labor classifications and added a new one and changed the wage rate fixed in the contract, was not a decision of the character abovementioned.

Up to the date of signing this construction contract (September 21, 1944) the Secretary of Labor's predetermination was that the prevailing wage rate for journeymen carpenters for the Sault Ste. Marie area was $1.25 per hour. This wage rate, right or wrong, prevailing or not prevailing at that time and place, was adopted by the War Department, placed in the bidding documents and in the contract specifications. Such wage rate was thus adopted by the War Department as the prevailing wage rate applicable to this project. As stated in the *Gillioz* case (*supra*), the contract made the Secretary's finding conclusive upon the contractor.

The Wage Adjustment Board later ruled that the predetermination of the prevailing wage rate for journeymen carpenters (at $1.25 per hour) for this locality was erroneout not only at the time it was made (presumably March

11, 1944) but was likewise erroneous and misleading at the time it was adopted by the War Department (September 21, 1944) and placed in the contract. On January 1, 1944 the local Carpenter's Union at Sault Ste. Marie entered into an agreement with some local contractors whereby the minimum rate for carpenters when working in or near water was $1.425 per hour (R. 23). The Secretary of Labor apparently knew nothing of this local union agreement fixing the wage rate at $1.425 per hour when she determined on March 1, 1944 that $1.25 was the prevailing rate. The War Department likewise made an honest mistake when, on September 21, 1944, it adopted the Secretary of Labor's "prevailing" rate and incorporated it in the contract with the respondent. The respondent, likewise, knowing nothing of this local union agreement, and learning nothing of it during a visit to the site, relied upon the "prevailing" rate as set forth in the bidding documents and as embodied in the contract and bid accordingly (R. 17). The respondent hired a crew of carpenters at $1.25 per hour and started work on September 21, 1944. On October 6, 1944 the respondent first learned about the local union agreement and of the pre-existing higher local wage rate (R. 17).

This Court is familiar with the course of the respondent's dispute with the union culminating in a finding by the Wage Adjustment Board, as an agency of the Secretary of Labor, that the rate of $1.425 and not $1.25 per hour was the prevailing rate for carpenters in this locality on September 21, 1944 when the contract was signed. The Wage Adjustment Board directed that $1.425 be paid retroactive to the beginning of the project. Work began on this project on September 21, 1944 (R. 17) and that is the same date on which the contract was signed.

In the plaintiff's dispute with the union, the union did not take the position that it was asking for a raise in the carpenters' wage rate. The union consistently maintained

that the rate of $1.425 per hour was the prevailing wage rate in that locality and had been the prevailing rate for 2 years, *i. e.*, since 1942. The Hearing Officer of the Wage Adjustment Board of the Department of Labor found that the prevailing rate in this locality was $1.425 or higher since May 1942 and this report formed the basis of the directive order.

We thus reach the conclusion that here we do not have a finding of a wage increase or an order to increase wages as contemplated under Executive Order 9250 and the General Order and Regulations issued thereunder. We have here, in truth, a finding by an instrumentality of the Secretary of Labor (created by her Administrative Order 101) that the prevailing wage rate for carpenters working at or near the water was $1.425 per hour on September 21, 1944 and not $1.25 per hour, which the contract of that date specified to be the prevailing rate, and a direction to the contractor to pay such higher prevailing wage rate.

Thus no sovereign act is here involved. It is merely an appraisal or a valuation, a determination of a fact (what is the prevailing wage rate in this locality) and the correction of a possible mistaken determination originally made pursuant to powers in existence long before the war and having no relation to the war or to the problem of controlling inflation.

The Secretary of Labor in Administrative Order 101 stated that one of the reasons for creating the Wage Adjustment Board in May 1942 was to accomplish the purpose of the Act of March 3, 1931 as amended and that act, it will be recalled, set forth the authority for the determination and use of the prevailing wage in Government construction contracts. Such is the function that has been performed in our case by the Wage Adjustment Board.

What we do have here is an honest mistake in the predetermination of the $1.25 wage rate and the use of that

mistake and erroneous wage rate in the contract. When that error was corrected by the retroactive finding of the Wage Adjustment Board serious injury was caused to the contractor.

On December 2, 1946 the Court of Claims decided a case which appears to be determinative of our case. *Albert & Harrison, Inc.* v. *United States,* 107 C. Cls. 292, certiorari denied, 331 U. S. 810. There the War Department mistakenly placed the wrong wage rate ($1.50) in a contract instead of the correct rate as determined by the Department of Labor ($1.75). Recovery was had by the plaintiff. In our case the error was initially made not by the War Department but by the Secretary of Labor in determining that $1.25 was the prevailing wage rate for certain carpenters in the Sault Ste. Marie area in 1944. The War Department adopted that mistaken determination and bound the contractor to it, and obtained contractor's bid prices based upon it. Of what signficance is it that the initial mistake was made not in the War Department as in the case cited, but by the Secretary of Labor and adopted and used by the War Department?

POINT THREE

The risk of increase in carpenters' wages was not a risk assumed by the plaintiff.

Contractors are accustomed to assuming risks, they being an essential feature of the construction industry. Contractors include in their bids amounts, which, in their opinion, are sufficient to compensate them for the risks to be encountered.

In the instant case, the bidding and contract documents set forth the minimum and maximum wages to be paid, so the risk of fluctuation in rates of wages was not one assumed by the respondent and it made no provision to meet such risk.

The risk of increased wages having been specifically eliminated from the contract and the United States having received a lower bid because of that fact, and the increase in wages having been specifically ordered by the United States, it cannot now claim that the respondent should not receive the extra wages paid pursuant to such order of the United States.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition herein should be denied.

Respectfully submitted,

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